Supreme Court, U S
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No. 10-868

In the Supreme Court of the United States

MATTHEW CATE, *et al.*, *Petitioners*,

v.

JOHN PIRTLE, *et al.*, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT RON MOSLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court should grant certiorari to review a Ninth Circuit opinion that has been withdrawn.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit Court of Appeals, which Matthew Cate has petitioned this Court to review, were Ron Mosley (appellant) and S. Oroski (appellee).[1]

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[1] Respondent Mosley is currently in Secretary Matthew Cate's constructive custody. Therefore Secretary Cate, rather than the warden who had custody during the pendency of the underlying litigation, is named as the petitioner in the petition for certiorari.

OPINIONS AND JUDGMENTS BELOW

Pursuant to United States Supreme Court Rules 15.3 and 24.2, Respondent adopts petitioner's statement regarding the opinions and judgments below, except to note that on January 31, 2011, the Ninth Circuit withdrew its November 24, 2010 opinion granting Mr. Mosley's petition for a writ of habeas corpus. *Mosley v. Oroski*, Nos. 08-15327, 08-15389 (9th Cir. Jan. 31, 2011) (order withdrawing memorandum decision).

JURISDICTION

Pursuant to United States Supreme Court Rules 15.3 and 24.2, Respondent adopts petitioner's statement regarding jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2101(e) states:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

United States Supreme Court Rule 11 states:

> A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a

showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.

STATEMENT OF THE CASE

Pursuant to United States Supreme Court Rules 15.3 and 24.2, Respondent adopts petitioner's statement of the case, except once again to note that on January 31, 2011, the Ninth Circuit withdrew its November 24, 2010 decision granting Mosley's petition for habeas corpus.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEGAL ARGUMENT

Respondent Ron Mosley's case is not properly before this Court. On January 31, the Ninth Circuit withdrew the very opinion which Petitioner asks this Court to review. *Mosley v. Oroski*, Nos. 08-15327, 08-15389 (9th Cir. Jan. 31, 2011). Consequently, there is no opinion from the Court of Appeals for this Court to review. Nor would it be appropriate for this Court to review the district court's May 1, 2007 ruling, which is now the last official ruling on the merits of Mr. Mosley's petition, while his case remains pending before the Ninth Circuit. Thus, the state's petition for writ of certiorari should be denied.

While 28 U.S.C. § 2101(e) allows this Court to review a district court ruling in the absence of

appellate review, United States Supreme Court Rule 11 requires that any such case be "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." To meet the Rule 11 standard, a case must be "of extraordinary constitutional moment [or] demanding [of] prompt resolution for other reasons." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 351 n.30 (1985) (Brennan, J., dissenting) (collecting cases in which certiorari was granted without appellate review pursuant to the Rule 11 standard and including *United States v. Nixon*, 418 U.S. 683, 686-687 (1974) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), among others).[2]

Mr. Mosley's petition for writ of habeas corpus is not "of extraordinary constitutional moment [or] demanding [of] prompt resolution for other reasons," and Petitioner makes no attempt to argue otherwise. Further, the district court denied Mr. Mosley's petition in its entirety, so there is nothing for the state to appeal. *Mosley v. Oroski*, No. 05-CV-04260, 2007 WL 1279643 (N.D. Cal. May 1, 2007). Thus, the petition for writ of certiorari should be denied as to Mr. Mosley.

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[2] Justice Brennan refers to Supreme Court Rule 18, rather than Supreme Court Rule 11. But the language he quotes is nearly identical to this Court's current Rule 11. See *Walters*, 473 U.S. at 350.

CONCLUSION

Mr. Mosley requests that this Court deny the state's petition for writ of certiorari.

March 3, 2011 Respectfully submitted,

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